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IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, An Individual
and on Behalf of All Others Similarly Situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* MCI WORLDCOM COMMUNICATIONS, INC. AND SPRINT CORPORATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

MCI WorldCom Communications, Inc. ("MCI") and Sprint Corporation ("Sprint") (collectively, "*amici*"), are nationwide providers of a wide variety of telecommunications services, including long distance services.[1] The Ninth Circuit's holding in this case threatens to alter substantially the way *amici* provide their long distance services to millions of residential and small business consumers, and it threatens to impose serious costs on *amici* and higher rates on their customers.

Like Petitioner AT&T Corp. ("AT&T"), MCI and Sprint generally provide long distance services to residential and small business customers pursuant to uniform nationwide agreements. Like the agreement used by AT&T, the agreements used by MCI and Sprint incorporate dispute resolution provisions that rely on arbitration and other alternative dispute mechanisms to minimize the costs of customer disputes, and allow MCI and Sprint to offer reduced rates to their customers. And like AT&T, MCI and Sprint have seen their settled understandings about the legality of these provisions upended by a decision of the Ninth Circuit that casually discards nearly a century of settled law.

As a result of the decision below, long distance carriers such as *amici* are entering an extended period of

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[1] Pursuant to Rule 37.2 of the Rules of this Court, counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

legal uncertainty. Rather than a coherent national communications policy formed by a single agency with a thorough understanding of interstate telecommunications, long distance providers must engage in Circuit-by-Circuit warfare with plaintiffs' class action lawyers to determine first, whether state or federal law governs, and second, in Circuits where state law governs, what state law requires. That exercise will be a substantial drain on resources at a time when telecommunications companies such as *amici* can least afford it.

Accordingly, *amici* have a strong interest in making sure that this Court reviews, and ultimately reverses, the Ninth Circuit's decision in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case threatens to alter substantially the way *amici* MCI and Sprint contract to provide their long distance services to millions of residential and small business customers, imposing significant costs on *amici* and higher rates on consumers. Moreover, the decision will strain scarce judicial resources, as plaintiffs engage in Circuit-by-Circuit class action litigation to establish first, whether in that Circuit federal law or state law governs interstate long distance contracts, and second, in Circuits that hold (as did the Ninth Circuit) that state law governs, what precisely state law requires.

Such an outcome would be troubling under any circumstances, but here it is especially so, because the Ninth Circuit's decision stands alone. As AT&T's Petition for a Writ of Certiorari demonstrates, the decision squarely conflicts with a decision of the Seventh Circuit applying

identical provisions of federal law to identical contractual provisions, and it is inconsistent with decisions of this Court and orders of the Federal Communications Commission ("FCC" or "Commission").

Review by this Court is urgently needed. At the outset, the impact of the Ninth Circuit's decision extends well beyond the confines of this case. The AT&T Customer Services Agreement (the "AT&T Agreement") at issue is used nationally, and it will be subject to further challenge in States outside the Seventh Circuit if this Court lets the Ninth Circuit's decision stand. More important from the perspective of the *amici*, the nationwide agreements employed by *amici* MCI and Sprint contain dispute resolution provisions similar to those in the AT&T Agreement, requiring, for example, that consumers arbitrate complaints that are not brought in small claims court or before the FCC. MCI's agreements, like the AT&T Agreement, also expressly prohibit the use of class actions. These and other previously uncontroversial provisions are subject to attacks as a result of the Ninth Circuit's decision.

The consequence of those attacks will be "patchwork contracts," *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002), as fifty States apply their own particular notions of unconscionability to invalidate individual provisions of nationwide agreements that have long been held to be "just and reasonable" by the FCC. The attacks will also impose substantial transaction costs and, inevitably, higher rates, resulting both from the increased uncertainty regarding the liability regime that governs contracts for long distance services, and from the invalidation of provisions – such as the arbitration provisions invalidated by the Ninth Circuit in this case – that permit reduced rates for consumers. Whether

borne principally by providers of long distance companies or passed on to consumers, such costs are inconsistent with the Communications Act of 1934 ("Communications Act") and with the competition that Congress and the FCC sought to encourage and preserve.

Review of the decision below is particularly appropriate because, in reaching its decision, the Ninth Circuit created a direct Circuit split and cast aside nearly a century of settled law. First and foremost, the decision of the Ninth Circuit conflicts directly with the decision of the Seventh Circuit in *Boomer*, as the Ninth Circuit itself acknowledged. Pet. App. 11a. The Ninth Circuit held that Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202, do not preempt state unconscionability law challenges to the AT&T Agreement. The Ninth Circuit thus affirmed a decision of the district court that declared unconscionable under California law certain provisions of the AT&T Agreement, including dispute resolution provisions that generally require consumers to resolve disputes through arbitration and that limit the availability of class actions. By contrast, in *Boomer*, the Seventh Circuit concluded that Sections 201 and 202 do preempt state law challenges to these precise dispute resolution provisions.

Second, the decision of the Ninth Circuit conflicts with decisions of this Court holding that the non-discrimination provisions contained in federal communications statutes preempt state law challenges to rates, terms, and conditions governing interstate telecommunications services. In *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919), for example, this Court upheld a limitation-of-liability provision contained in a telegraph contract notwithstanding the

unenforceability of that provision under state law. The Court held that the congressional goals embodied in the nondiscrimination provisions that were the statutory predecessors of Sections 201 and 202 "would be wholly destroyed if . . . the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws." 251 U.S at 30; *see also Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 573-74 (1921) (noting that once a reasonable rate was established by a telegraph company, federal law "required that it should have exactly the same force and effect as the rate" contained in a filed tariff). Moreover, the Court reached this conclusion despite the absence of any statutory tariff-filing requirement – that is, the nondiscrimination provisions themselves rather than the presence of tariffs preempted state law. *See* 256 U.S. at 573-74. The Ninth Circuit's refusal to recognize the preemptive force of the current non-discrimination provisions of the Communications Act cannot be reconciled with these decisions.

Third, the decision of the Ninth Circuit in this case is inconsistent with the FCC orders implementing detariffing. In the wake of the Commission's initial detariffing order, AT&T, supported by MCI and Sprint, sought clarification that "federal, and not state, law governs the determination as to whether a nondominant interexchange carrier's rates, terms, and conditions for interstate, domestic, interexchange services are lawful." *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 F.C.C.R. 15014 ¶ 76 (1997). The FCC "agree[d]" that "the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions," and the Commission clarified that

state law applied only to "issues, such as contract formation and breach of contract," *i.e.*, issues regarding "the legal relationship between the carrier and customer in a detariffed regime." *Id.* ¶ 77. The Ninth Circuit has unapologetically – and erroneously – excised that holding from the FCC's order.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's misreading of the preemptive scope of Sections 201 and 202 of the Communications Act will impose substantial transaction costs on companies, like *amici* MCI and Sprint, that provide long distance telecommunications services, resulting in higher prices and fewer choices for consumers.

1. Although the Ninth Circuit's decision in this case, like the Seventh Circuit's decision in *Boomer*, dealt with dispute resolution provisions contained in AT&T's nationwide customer agreements, the impact of the Ninth Circuit's decision is far broader: the nationwide agreements used by many long distance companies contain mandatory arbitration provisions and class action limitations that are similar to those at issue here, and are now subject to attack.

MCI, for example, provides long distance services to "mass markets" customers pursuant to two nationwide agreements: a General Service Agreement for Residential Customers ("MCI Residential Agreement") and a General Service Agreement for Small Business Customers ("MCI Small Business Agreement") (collectively, the MCI Agreements"). Each of the MCI Agreements contains provisions that generally require arbitration and that limit the availability of class relief. Section VIII of the MCI

Residential Agreement, for example, is entitled "DISPUTE RESOLUTION," and it states that "THIS SECTION PROVIDES FOR RESOLUTION OF MOST DISPUTES THROUGH BINDING ARBITRATION." Section VIII(D) further explains that

> [a]ny dispute arising out of or related to this Agreement or the Company's products or services that is not satisfactorily resolved within 60 days from the date on which you notify the Company in writing, regardless as to whether the dispute is based in contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory, must be submitted either to the American Arbitration Association ("AAA") or to JAMS ("JAMS") for final and binding arbitration.[2]

In addition, Section VIII(J) limits the availability of class relief, providing that

> [e]ach dispute will be decided on an individual basis and will not be consolidated in any action with the disputes or claims of other consumers or customers. You agree that you may not bring any dispute or claim as a class action or as a private attorney general, and you agree not to act as a class representative or participate as a member of a class of claimants with respect to any dispute

[2] Section VIII(E) of the MCI Residential Agreement makes clear that, under AAA Rules and JAMS Rules, consumers may also have the right to take certain disputes to small claims court or to seek relief from appropriate governmental agencies such as the FCC.

> or claim relating to this Agreement or the services provided by the Company.

The MCI Small Business Agreement contains identical provisions. *See* MCI Small Business Agreement § VIII(D), (E).

Similarly, the agreement that defines the rates, terms, and conditions of Sprint's long distance services ("Sprint Terms Agreement") provides as follows:

> MANDATORY ARBITRATION OF DISPUTES. ANY CLAIM, CONTROVERSY OR DISPUTE OF ANY KIND BETWEEN YOU AND SPRINT AND/OR ANY OF ITS EMPLOYEES, AGENTS, AFFILIATES OR OTHER REPRESENTATIVES, WHETHER SOUNDING IN CONTRACT, STATUTE, OR TORT, INCLUDING FRAUD, MISREPRESENTATION, FRAUDULENT INDUCEMENT, OR ANY OTHER LEGAL OR EQUITABLE THEORY AND REGARDLESS OF THE DATE OF ACCRUAL OF SUCH CLAIM, CONTROVERSY OR DISPUTE WILL BE RESOLVED BY FINAL AND BINDING ARBITRATION AS PRESCRIBED IN THIS SECTION. . . .

Sprint Terms Agreement § 8.4.[3] Thus, MCI and Sprint each use a nationwide agreement that contains arbitration provisions similar to those at issue in the AT&T Agreement and held to be subject to state law challenge by the Ninth Circuit in this case.[4]

2. Plaintiffs' lawyers have already embraced the Ninth Circuit's decision, and further litigation resulting from that decision is inevitable. In *In re Universal Service Fund Telephone Billing Practices Litigation*, No. 02-CV-1583, *et al.* (D. Kan.) ("the USF Litigation"), for example, plaintiffs filed (prior to the Ninth Circuit's decision) more than 50 putative class actions or representative actions in state and federal courts across the country, challenging the way that AT&T, MCI, and Sprint billed customers to finance the

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[3] Although the Sprint Terms Agreement does not contain a separate provision precluding class actions, the arbitration provision itself accomplishes the same result, because arbitrations do not generally permit resolution of claims on a class-wide basis.

[4] Although both MCI and Sprint have incorporated into their nationwide agreements mandatory arbitration provisions that are similar to those employed by AT&T, other aspects of the AT&T Agreement that the Ninth Circuit found objectionable have not been incorporated into the MCI and Sprint agreements. In particular, neither MCI nor Sprint seeks in their agreements to (1) limit liability for intentional or willful misconduct, (2) require confidentiality with respect to arbitrations, or (3) require fee splitting to the same extent as AT&T. *See* Pet. App. 38a-42a (discussing those aspects of the AT&T Agreement). Moreover, significant differences between the customer contracting methods adopted by AT&T and the contracting methods and communications approaches adopted by Sprint and MCI render the companies differently situated on the merits of any "procedural unconscionability" claim. *See* Pet. App. 36a-37a (discussing procedural unconscionability claim against AT&T).

companies' obligations in connection with funds used to preserve and advance the federal universal service support mechanism. *See generally In re Federal-State Joint Board on Universal Service*, 15 F.C.C.R. 12050, ¶ 11 (2000) (describing obligations). In response to the invocation by Sprint and AT&T of the dispute resolution provisions contained in their respective customer contracts, plaintiffs have cited the Ninth Circuit's decision in this case, seeking not only to evade arbitration, but also to preserve substantive state law claims that, under the Seventh Circuit's decision in *Boomer*, the Communications Act would preempt.[5]

More broadly, Sprint and other long distance carriers are subject currently, and are certain to be subject in the future, to lawsuits challenging the provisions of their nationwide customer contracts. Thus far, the impact on MCI has been limited because virtually all commercial litigation against MCI (including the USF litigation) has been subject to the automatic stay imposed as a result of the bankruptcy filing of WorldCom, Inc. But MCI is expected to emerge from bankruptcy shortly,[6] resulting in the termination of the stay and the resumption of the suits that inevitably arise out of the provision of phone service. The widespread impact of the Ninth Circuit decision is thus undeniable.

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[5] Although MCI has been named as a defendant in a number of these consolidated actions, the automatic stay resulting from the bankruptcy filing of WorldCom, Inc. has prevented those actions from going forward against MCI. Some USF plaintiffs have filed proofs of claim against MCI in the bankruptcy case.

[6] Christopher Stern, *WorldCom to Unveil Reorganization Plan*, Wash. Post, Apr. 14, 2003, at A14 (noting WorldCom's plans to emerge from bankruptcy by Fall 2003).

3. Immediate review by this Court is needed because the Ninth Circuit's decision has upset more than a century of settled understanding regarding the source of obligations that govern domestic long distance service contracts. Even prior to imposition of the tariff-filing requirements contained in Section 203 of the Communications Act, this Court made clear in cases such as *Warren-Godwin Lumber* and *Esteve Brothers* that federal law preempts state law and is thus the sole source of substantive law regarding the rates, terms, and conditions contained in contracts for interstate telecommunications services. Numerous cases from this Court, including *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), confirmed that federal law, rather than state law, governed contracts for such services. And, in the post-tariff world, the FCC made clear in its orders that detariffing did not change the source of substantive law governing the "lawfulness of rates, terms, and conditions." 12 F.C.C.R. 15014, ¶ 76. The Seventh Circuit in *Boomer* then reaffirmed the preemptive force of federal law. Thus, while the precise contours of federal law may have been uncertain at the margins, providers of interstate telecommunications services have known for nearly a century that federal law controls the rates, terms, and conditions under which those services are provided.

The Ninth Circuit's decision has casually discarded this century of settled law. By expressly rejecting the decision of the Seventh Circuit, the Ninth Circuit has left carriers uncertain about the source of law governing the agreements that cover tens of millions of long distance customers. It is difficult enough that, in the States within the jurisdiction of the Ninth Circuit, carriers are subject to state

law where federal law has previously governed. But the current situation is worse: outside of the Seventh Circuit and Ninth Circuit, carriers do not even know whether in a particular State federal or state law controls.

Absent intervention by this Court, resolving this uncertainty will be a tremendously costly enterprise. Nationwide carriers such as *amici* will be forced to rely on Circuit-by-Circuit litigation to eliminate the confusion that the Ninth Circuit's decision has caused and to clarify the source of governing law in each federal Circuit. This Court should not leave in place a direct conflict that will necessarily impose such significant and wasteful costs on carriers and consumers, and result in the unnecessary expenditure of scarce judicial resources.

4. Finally, this Court should grant review because the Ninth Circuit's view that state law, rather than federal law, governs the lawfulness of rates, terms, and conditions of interstate long distance service is fundamentally at odds with the Communications Act and will cause serious harm to the markets for interstate telecommunications services. The Ninth Circuit's decision will inevitably result in "patchwork contracts" and a "labyrinth of rates, terms, and conditions." As the Seventh Circuit correctly concluded, reiterating the conclusion of this Court in *Warren-Godwin Lumber*, 251 U.S. at 30, such an outcome is fundamentally incompatible with the goal of "equality and uniformity," and is thus directly contrary to the terms of the Communications Act and the evident intent of Congress.

Moreover, the practical consequences of the Ninth Circuit's decision are severe. A century of exclusive federal control has resulted in an established body of federal law

governing whether a particular provision is just and reasonable. The Ninth Circuit's decision casts this substantial body of precedent aside, leaving to each individual State the task of sorting out which provisions are just and reasonable and which are not. But States have never had a role in making such determinations, and the process of building up a body of law will be a lengthy and costly process. The Ninth Circuit never explains why Congress (or the FCC) would have wanted such a process.

Indeed, it is hard to imagine such a reason. The only ground even suggested in the Ninth Circuit's opinion is the need to provide "protection for consumers." Pet. App. 29a. But that justification is utterly insufficient. Preemption of state unconscionability law does not leave consumers vulnerable. Instead, it merely relies on uniform national rules administered by the FCC rather than rules created in each of the fifty States through class action litigation. Indeed, in the detariffing order, the FCC emphasized that it would continue to enforce through its complaint process the carriers' "obligations under sections 201 and 202 to charge rates, and impose practices, classifications, and regulations that are just and reasonable, and not unjustly or unreasonably discriminatory." 12 F.C.C.R. 15014, ¶ 77.

Moreover, the FCC's principal justification for detariffing was that the long distance market itself, because it is fully competitive, would protect consumers, rendering unnecessary the extra protections that had previously been provided by tariffs. There is no reason to believe – and the Ninth Circuit provides none – that vigorous competition in the long distance market and the backstop of the Communications Act are inadequate to protect consumers, much less sufficiently inadequate to justify the substantial

costs imposed by the Ninth Circuit's decision. It is thus particularly unlikely that Congress or the Commission would have intended a result as potentially costly, unnecessary, and destabilizing as the one the Ninth Circuit has created.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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